82-49

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN,
Petitioner

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW[1]

I.

The Court of Appeals on the one hand affirmed a judgment for plaintiffs amounting to $2.3 million and interest for age discrimination violative of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634—reportedly the largest award under ADEA thus far and surely the most publicized—and on the other hand held emphatically that the District Court erred in instructing the jury on the standard for ADEA liability by *"completely fail[ing]* to give [the jury] any guidance as to [its] meaning" and departed as well from "strongly preferred" procedure in requiring the jury to decide ADEA and pendent state claims together, i.e. as one, on general forms of verdict. The Court of Appeals also held, however, that the errors committed at trial were harmless, not prejudicial, because there was "ample evidence" that I. Magnin terminated plaintiffs' employment because of age under a proper interpretation of ADEA, because the case "was not decided by a hairsbreadth," and because there was no indication in the record that the jury would have reached a different verdict had the District Court not committed error in its liability instruction.[2]

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1. The caption of the case in this Court contains the names of all parties.

Emphasis in matter quoted here has been supplied.

2. The Court also observed that the liability instruction "was fashioned by the judge from language submitted by I. Magnin." There is naked semantic truth in this because the trial judge rewrote one of several instructions proposed by Magnin to a different end into the only ADEA liability instruction given. The court declined to give further proposed instructions on ADEA liability which Magnin, with the concurrence of plaintiffs' counsel, sought vigorously. It has never been suggested that Magnin waived the error in the instruction the District Court gave; if the Court of Appeals thought the error had been waived, its decision to affirm would have been supported by a firm, traditional ground. *See Beckley Newspapers v. Hanks*, 389 U.S. 81, 82 (1967).

The published opinion of the Court of Appeals, and its soon to be published amended opinion on denial of rehearing, are certain to raise important and troubling questions in age discrimination and other discrimination cases in the future. The questions may be stated thus:

A. Is not the Court of Appeals, in its original opinion and amended opinion on denial of rehearing, seen to have created a new doctrine of harmless error for age discrimination cases? Will not the decision below be understood by lower courts as empowering or obliging them to brush aside error in liability instructions as harmless if the evidence favoring the party in whose favor a verdict has been returned appears "ample," even though that evidence is sharply disputed? And is there not a risk that the anticipated burgeoning of age discrimination litigation in a maturing society will be complicated by the appearance of a special body of law applicable to trial court error in such cases different from the law which governs other civil litigation?

B. Does not the determination of the Court of Appeals that the errors in this case were harmless intrude impermissibly on the right of parties on both sides to a traditional trial by jury? One such right is the right of an aggrieved litigant to a new trial where the verdict against that party is founded upon prejudicial error—a risk assumed by every party demanding a jury trial—and does not the decision of the Court of Appeals here threaten flirtation with new law for age cases alone in which fact finding by a well-instructed jury would be replaced either by a judges' prediction upon the raw trial record of what a well and thoroughly instructed jury might have decided or, more realistically, an appellate finding of fact on liability? *See Pullman-Standard v. Swint*, ... U.S. ...., 50 U.S.L.W. 4425, 29 FEP Cases 1073 (April 27, 1982).

C. Does not the decision of the Court of Appeals on harmless error also threaten to emasculate the Court's recent explanation in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), that defendant's articulation of a legitimate non-discriminatory reason for its action "frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Does it not combine futility with prejudice to "frame the factual issue" and then compel the jury to decide it without adequate explanation of the standard which is to guide the choice between the factor of age and other alleged causes? And is not the *McDonnell-Douglas* procedure elaborated in *Burdine* itself difficult enough of management in employment jury cases to call upon the Court to warn against a principle of harmless error which may set the ultimate issue at large for decision upon the jury's conception of fairness or reasonableness of the employer's behavior, whether or not motivated by consideration of age?

II.

Intermixed with these questions is the existence in the Circuits of troubling discussion of the semantics of jury instructions to be given on liability in ADEA cases[3]. We submit this itself argues for the attention of the Court. The questions are:

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3. The District Court for the Northern District of California has observed, "The articulation of the controlling standard of proof [under ADEA] has generated a certain amount of semantic confusion," with footnote citations to various statements of the test in the published decisions then available. *Olson v. Southern Pacific Transp. Co.*, 480 F.Supp. 773 (N.D.Cal. 1979), *aff'd*, 654 F.2d 723 (9 Cir. 1981).

The decisions of the Courts of Appeals cited below suggest that the Circuits called upon to decide the question have been troubled over semantic differences in ADEA liability standards approved since 1975. Under ADEA, the semantics of liability and burden of proof often play a larger than usual role for reasons elaborated *infra*, pp. 21-22.

A. Are juries in ADEA cases to be instructed that liability requires a finding by the jury that age was a "determining factor" in the "but for" sense, as the First, Fourth and Seventh Circuits have held, *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979),[4] *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4 Cir. 1981), *cert. denied* .... U.S....., 102 S.Ct. 316 (Oct. 5, 1981), and *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7 Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); or that "age made a difference," as held by the Sixth, Fifth and Second Circuits, *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6 Cir. 1975), *Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981) and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2 Cir. 1981); or that juries may be instructed to follow either the "but for" or "age made a difference" tests *"or their equivalent,"* as held by the Court of Appeals in this case, or "some formulation of the determining factor test," as earlier held by the Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9 Cir. 1981)?

B. In view of the inevitable presence of multiple causes for an employee discharge in ADEA jury cases where age discrimination is the basis claimed, is not the existence in the Circuits of semantically different ADEA liability standards, couched as "determining factor," "age made a difference," or "their equivalent," likely to cause inconsistent results among the Circuits in like cases, and is this not

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4. Cited with approval on another point in *Texas Dept. of Community Affairs v. Burdine, supra*, 450 U.S. at 252.

especially so if, as in this case, adjudicated error in jury instructions on ADEA liability is to be disregarded as harmless where the evidence favoring a prevailing party is "ample" even though sharply in dispute on the whole of the record?

C. Is this not a case in which the Court should settle the law by approving a uniform interpretation of ADEA as requiring the determining factor test in the "but for" sense, consistent with the Title VII standard approved in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976), and also reject the Ninth Circuit's "ample evidence" standard for harmless error in age cases by reversing and remanding for a new trial?

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC. d/b/a I. MAGNIN,

Petitioner

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Philip D. Cancellier, John W. Costello and Zelma S. Ritter v. Federated Department Stores, Inc., d/b/a I. Magnin, Nos. 81-4154 and 81-4165 below.

OPINIONS BELOW

The opinion of the Court of Appeals filed March 30, 1982, is reported in 672 F.2d 1312, in 1982 Employment Practices Decisions ¶ 32, 639 and in 28 FEP Cases 1151. A copy is printed as Appendix A. The amendment to the opinion on denial of rehearing filed May 27, 1982, is not yet published and is printed as Appendix B. There is no opinion of the District Court.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision and filed its opinion on March 30, 1982. A timely petition for rehearing and rehearing *en banc* was denied on May 27, 1982 (App. C). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). The District Court had jurisdiction under 29 U.S.C. §§ 626(b) and 626(c)(1) and 28 U.S.C. § 1331(a).

STATUTES INVOLVED

Age Discrimination in Employment Act of 1967, Pub.L. 90-202, 81 Stat. 602, as amended:

Section 4 (29 U.S.C. § 623)

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. ***

Section 7 (29 U.S.C. § 626)

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: ***

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 12 (29 U.S.C. § 631)

(a) The prohibition in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Plaintiffs Cancellier, Costello and Ritter, then aged 52, 54 and 53, brought this action against Magnin in the District Court in July 1979 on allegations that their employment at the I. Magnin store in San Francisco had been terminated because of age in violation of ADEA. Their complaint also alleged pendent state claims for breach of employment contracts and tortious breach of an employer's implied-in-law covenant to deal fairly.[5] At the time of their terminations, plaintiffs had been employed by Magnin for 25, 17 and 18 years, respectively.

The action was tried to a jury in the District Court over five weeks beginning in December 1981. In January the jury returned on general forms—given them by the District Court over Magnin's objection—verdicts for Cancellier in

5. Plaintiff Costello alleged state claims for fraud and misrepresentation, in addition to claims for breach of contract and the implied covenant. The jury decided these claims in favor of Magnin, and Costello made no complaint about that on appeal.

the amount of $800,000, Costello in the amount of $600,000 and Ritter in the amount of $500,000, a total award of $1.9 million which swelled to a judgment of slightly more than $2.3 million after award of attorneys' fees and costs. Plaintiffs' damage recovery represented an award of from 6 to 8.9 times the maximum back pay lost by each plaintiff calculated by multiplying each plaintiff's monthly salary by the number of months from his or her termination of employment to the time the trial began. The Court of Appeals recognized that the judgment must have included a significant award of punitive damages (672 F.2d at 1318).

Plaintiffs' case was alleged, tried, and argued by their counsel and decided by the jury as one for age discrimination. The state claims for breach of contract and an implied covenant of fair dealing, although legally distinct from the ADEA claim as the Court of Appeals recognized (672 F.2d at 1318 n.6), were founded solely upon evidence related to age, and the allegations of the complaint also were so confined. Plaintiffs' Pretrial Statement framed the issues of fact for trial of their complaint in terms of age discrimination; no issue was asserted suggesting any breach of contract or tortious breach of covenant for reasons other than age. Plaintiffs' counsel argued the breach of covenant claim to the jury with the observation that "we don't need to go over the pretext [on ADEA] again to detail those facts ***;" the contract claim was argued with a brief statement that employment contracts embodied in personnel policies recognizing the benefit to Magnin of long service and experience, taken together with "better than good" performance evaluations of plaintiffs, were "made a mockery" because plaintiffs were terminated out of preference for younger people. There was no evidence even

hinting at any wrong done plaintiffs by Magnin for reasons or upon any basis of contract or breach of covenant apart from age.[6]

The role played by age in the termination of plaintiffs' employment was sharply disputed.[7] Plaintiffs claimed for the evidence that Magnin had adopted an explicit policy of replacing older employees within the age group protected by ADEA with younger people and that plaintiffs were terminated because of this despite good employee performance. Magnin claimed for the evidence that each

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6. We print in Appendix D pertinent extracts from plaintiffs Complaint, Pretrial Statement and Argument to the Jury.

The statement of the Court of Appeals (672 F.2d 1318 n.6) that the state claims "do not depend on age" is correct only in the sense that the claims are distinct from ADEA in legal theory. The opinion as a whole acknowledges that age discrimination was as much the factual basis for the state claims as it was for the claimed violation of ADEA, and the Court's extended discussion was directed to harmonizing plaintiffs' acknowledged recovery of punitive damages on the state claims against the unavailability of such damages under ADEA. The Court's emphatic warning against repetition of the District Court's error in instructing the jury and its submission to the jury of general verdicts was explicitly concerned with trial of future cases where age is the *sine qua non* of complaint under both ADEA and state employment law (672 F.2d at 1317). See text, *infra*, p. 13.

7. The District Court denied plaintiffs' motion for a directed verdict out of hand. Since that time, neither plaintiffs nor the District Court nor the Court of Appeals have ever suggested that plaintiffs were entitled to a directed verdict or otherwise entitled to recover as a matter of law. We discuss the significance of this to the Court of Appeals' determination that the errors at trial were harmless, *infra*, p. 18.

plaintiffs' performance had become unsatisfactory, that age played no causal role in termination of plaintiffs' employment, and that routine reference to plaintiffs' ages in personnel records and notes in evidence signified a determination by Magnin to recognize, and act fairly in light of, plaintiffs' length of service. The parties summarized their own clashing views of the conflicting evidence in their briefs to the Court of Appeals; extracts from the briefs on both sides are printed as Appendix E. The extracts show plaintiffs' own stance, acknowledged by Magnin, that the case was a sharply disputed series of factual issues for the jury.

The District Court rewrote Magnin's proposed instruction No. 21 and gave it as the only instruction to the jury on liability for violation of ADEA. That instruction, interlined and italicized to show deletions and additions, respectively, is as follows:

"DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21, AS AMENDED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

In 1967, Congress passed the Age in Discrimination in Employment Act. This Act provides that 'It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age *****'

I want to make clear to you exactly what law we are dealing with here. The statute I have just summarized, which is the statute under which plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of discrimination, nor does it forbid any other action or inaction by defendant rela-

8. The District Court here inserted plaintiffs' proposed instructions Nos. 34 and 35, printed as Appendix G.

tive to plaintiffs other than discrimination on account of age. It is not unlawful for an employer to discharge an employee for good cause, or to take any action against any employee where the action is based on reasonable factors other than age. Age must be a determining factor in an employer's personnel policies or practices before a violation of the Act occurs. Put another way, the basic principle is that an employer has the right to discharge an employee ~~for good reason, bad reason or no reason at all~~ absent *age* discrimination. Thus, if you should find that age was not a determining factor in plaintiffs' terminations or failure to be reemployed, then you must render a verdict for the defendant on these issues even though you might feel their terminations were unreasonable, arbitrary or unfair."

Magnin also proposed, but the District Court rejected, instruction No. 22, which set out the "age as a determining factor" test in the "but for" sense adopted by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979), and followed in the Fourth and Seventh Circuits. That instruction amplified the naked references to "determining factor" in proposed instruction No. 21, whose purport was to explain only that a discharge of an employee for a reason disagreeable to the jury did not violate ADEA so long as the discharge was not because of age. No. 21 did not elaborate the "determining factor" test and it was not drafted to do so. Plaintiffs' own proposed instruction No. 36 did set out a "determining factor" test in the "age made a difference" language adopted by the Sixth Circuit in *Laugesen v. Anaconda Co.*, 510 F.2d

307 (6 Cir. 1975) and followed in the Second and Fifth, but the District Court rejected it as well.[9]

Magnin's lead trial counsel objected (App. F) that "the omission of 22, 23, 24, 24A, 24B and 26 take away the heart of the defense. That is to say that the discharge, *the but for factor, is not contained in any of the instructions Your Honor proposes to give.*"[10]

Within minutes after retiring to deliberate, the jury sent this note to the trial judge:

> "The Jury in C 79-1591 RPA requests a review of your interpretation of ADEA."

The District Court then reread to the jury instruction No. 21, quoted above.[11]

The jury returned its verdict of $1.9 million for plaintiffs on general forms, and, after an award of attorneys' fees

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9. Plaintiffs' objection is printed in Appendix F together with plaintiffs' rejected instruction No. 36 and Magnin's rejected instruction No. 22. In time records filed as an exhibit to the Declaration of plaintiffs' lead counsel on their claim for attorneys' fees, these entries of lead counsel are recorded:

> "Telephone call with Ms. McClain and Mr. Lederman regarding *Court's error in excluding Laugesen instruction* regarding standard of causation under the ADEA (extensive conversation)." January 15, 1981.
>
> • • •
>
> Telephone call with Mr. Lederman re circumstances under which supplemental instructions are given to the jury in the course of deliberation; *discussion with Ms. McClain re effects of erroneous ADEA instructions:* review of transcript of jury instructions given January 15, 1981." January 16, 1981.

10. We elaborate *infra*, p. 15. The fact is that Magnin's complaint was not over what its rewritten proposed instruction No. 21 said but what the instructions as a whole did not tell the jury, and *that* is what the Court of Appeals *held* to be error.

11. Plaintiffs' instructions Nos. 34 and 35 (App. G) on the *Burdine* and *McDonnell-Douglas* order of proof and demotion in violation of ADEA also were reread. Neither contained any delineation of the standard for ADEA liability.

slightly in excess of $400,000, the Court entered a judgment for plaintiffs from which Magnin appealed.[12]

The Court of Appeals expedited the appeal and affirmed. Its opinion was amended on denial of rehearing. The Court held that the District Court erred in instruction No. 21 on liability for age discrimination and departed from "strongly preferred" procedure in submitting to the jury general forms of verdict in favor of each plaintiff,[13] but that the errors were harmless and hence required no new trial. In a petition for rehearing and rehearing *en banc* (App. C) Magnin urged that the Court had either ignored or failed for some reason to apply the test for harmless or reversible error laid down in decisions of this Court, e.g., *McCandless v. United States*, 298 U.S. 342 (1936), and *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), as well as *Kotteakos v. United States*, 328 U.S. 750 (1946), and decisions of the Ninth Circuit itself in *Almaraz v. Universal Marine Corp.*, 472 F.2d 123 (9 Cir. 1972), *Northern P. Railway v. Herman*, 478 F.2d 1167 (9 Cir. 1973), and *Pollock v. Koehring Co.*, 540 F.2d 425 (9 Cir. 1976). Magnin also called attention to the only authorities cited for the holding that the error in jury instructions was harmless, F.R.Civ.P., Rule 61, *Ginsburg v. Ginsburg*, 276 F.2d 94 (9 Cir. 1960), and 7 Moore's Federal Practice ¶ 61.11 (2d ed. 1979), as having to do only with harmless error in drafting a notice of appeal and other harmless error in matters Moore characterizes as involving "niceties of form." The Court of Appeals denied rehearing

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12. Plaintiffs appealed from the portion of the judgment refusing them reinstatement and an injunction, which the Court of Appeals affirmed.

13. The District Court sent to the jury separate forms of verdict in favor of Magnin proposed by it. The jury returned two of these only in Magnin's favor on Costello's claims of fraud and misrepresentation.

with an amendment to its opinion which cited *McCandless* and *Fillippon, inter alia,* but reiterated adherence to *Ginsburg* and Moore as the authorities for its holding of harmless error. These citations were coupled with the Court's observations that the evidence in favor of plaintiffs was "ample," that the case "was not decided by a hairbreadth," that the Court found no indication in the record that a properly instructed jury would have decided differently, and, as already stated, that "the challenged instruction was fashioned by the judge from language submitted by Magnin." We discuss the treatment of the case by the Court of Appeals in greater detail in our elaboration of the reasons for granting the writ, to which we now turn.

REASONS FOR GRANTING THE WRIT

I. The Decision and Opinion of the Court of Appeals Will Be Interpreted as Injecting a New Doctrine of Harmless Error Into Age Discrimination Cases Which Is Contrary to Settled Law Governing Other Civil Litigation.

A. This Is An Important Case With Nationwide Impact.

The award here of $2.3 million with interest to three individual plaintiffs in their 50's has been widely reported as the largest damage award for age discrimination under ADEA thus far. We know of no larger.[14] It will surely be looked to by Bench and Bar in future cases.

The United States work force includes 40 or more million people between the ages of 40 and 70,[15] the age group protected by ADEA, 29 U.S.C. § 631(a). It is common knowl-

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14. The case has received nationwide publicity on two occasions on a Sunday evening network television news program, CBS' 60 Minutes, which is said to enjoy the largest audience ratings for programs of its kind.

15. United States Department of Commerce, Bureau of the Census, 1981 Statistical Abstract of the United States (102d Ed.), p. 383.

edge that ours is a society of advancing age in which the number of ADEA cases can be expected to burgeon if not explode. It is also fair to say that federal age litigation is a new field even for the experienced in employment cases. Age cases, we believe, are seen to have a certain turbulence as the law begins to develop, not unlike that seen in Title VII cases a decade ago. Analogy to Title VII decisions is complicated by the right to jury trial in age cases and the even more striking consequences of the fact, as the Court of Appeals wrote, that age is an attribute which "comes to each of us in time" and hence "will inevitably be present in a multitude of employee discharges" (672 F.2d at 1316).

The opinion of the Court of Appeals recognizes this, and warns against repetition in future cases of what the District Court did at trial of this action in language more emphatic than that often used in reversing and remanding for a new trial. If the Court had reversed in this case, one might conclude that the Ninth Circuit had cast itself into the mainstream of developing ADEA law. But the Court of Appeals instead held the jury instructions and verdict forms so emphatically disapproved for other cases to have been harmless error in this case. Its ultimate decision will be seen widely, we submit, as creating a doctrine of harmless error for age cases which is at once remarkable, surprising and contrary to law thought to be settled.

B. The Opinion of the Court of Appeals on District Court Error in the ADEA Jury Instruction and Departure from Strongly Preferred Procedure on Form of the Jury Verdicts.

Because the Court of Appeals spoke carefully and plainly in its opinion—a fact which itself portends the anticipated impact of the case—we quote the opinion despite limited space in preference to characterizing it.

On error in instructing the jury on ADEA liability (672 F.2d at 1316):

> "The essence of a proper jury instruction under *Kelly* [*Kelly v. American Standard, Inc.*, 640 F.2d 974 (9 Cir. 1981)] is that it require the jury to focus on *the marginal effect of the age factor.* Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; age must 'make a difference' between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.
>
> "Here the district judge instructed the jury that '[a]ge must be a determining factor in an employer's personnel policies or practices before violation of the Act occurs.' *The district judge completely failed to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA,* or to refer to the *Laugesen* and *Loeb* test we adopted in *Kelly v. American Standard, Inc. This was error.* The words 'determining factor' are not self-explanatory. In general, fair application of the Act requires the trial judge to formulate precisely what employer conduct the ADEA redresses and what employer conduct it leaves undisturbed. Because the attribute with which the statute is concerned comes to each of us in time, it will inevitably be present in a multitude of employee discharges. It will be a factor in many and a determining factor in some. It is only this last group that can obtain relief under the ADEA, even though, in the broad sense, it aims to benefit the entire aged employment force."

On departure from "*strongly preferred*" procedure in use of a general verdict (*Id.* at 1316-1317):

> "I. Magnin contends that the district court committed reversible error by using simple general verdict forms

without requiring special interrogatories or any breakdown of the verdict by source of damages. Thus, I. Magnin contends, the possibility of punitive damages not recoverable under the ADEA in this lawsuit or of duplicative damages in the pendent state claims requires a new trial."

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"When state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA, however, review of jury verdicts presents special difficulty to appellate courts. A general verdict may conceal punitive damages which may not be allowed under the ADEA. If the state claims are flawed, the entire verdict may have to be reversed. For these reasons, a separate verdict for each claim and a separate verdict on punitive damages is strongly preferred."

In suggesting that repetition of what occurred here in future cases "may conceal punitive damages which may not be allowed under the ADEA" and "if the state claims are flawed, the entire verdict may have to be reversed," the Court was not suggesting that it had found a nonfederal basis for the judgment. It was warning that state and ADEA claims inevitably will be mixed together in future age discrimination cases where plaintiffs are tempted by the prospect of punitive damages, and that errors of the sort committed here can be counted upon to present "special difficulty to appellate courts" (*Ibid.*). See note 6, *supra*.

C. The Decision of the Court of Appeals that the Error Committed by the District Court was Nevertheless Harmless.

With respect to the jury instruction on liability (*Id.* at 1316):[16]

"However, a careful reading of the transcript and

16. The quotation is from the published opinion. It was amplified by amendment on denial of rehearing, printed as Appendix B.

record convinces us that in this case the instruction does not require reversal. Giving it was harmless error. There is little or no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age 'made a difference' in the termination of Cancellier, Costello, and Ritter. Moreover, it was conceded at oral argument that the challenged instruction was fashioned by the judge from language submitted by I. Magnin. While we are extremely reluctant to affirm verdicts based on jury instructions different from those approved in *Kelly* or their equivalent, we find that on the facts of this case refusing a new trial is consistent with substantial justice. Fed.R.Civ.P. 61; *Ginsburg v. Ginsburg*, 276 F.2d 94, 96 n.2 (9th Cir. 1960); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 61.11 & n.1a (2d ed. 1979). The instruction approved in *Kelly* adequately protects against mistaken inferences either that age must be the sole factor in the discharge, *or that age may be less than a 'but for' cause of the discharge.* It is strongly preferred. Here, however, we find the error harmless."

And on the use of general verdicts, which required the jury to determine ADEA and state claims on the one hand and compensatory and punitive damage claims on the other without specification or differentiation (*Id.* at 1317):

"Submission of special interrogatories is a matter committed to the discretion of the district judge. Fed. R.Civ.P. 49(b); *Monsma v. Central Mutual Insurance Co.*, 392 F.2d 49 (9th Cir. 1968); 5A J. Moore & J.

Lucas, *Moore's Federal Practice* ¶ 49.04 & n.3 (2d ed. 1981). A jury generally is not required to itemize the components that enter into an award of damages (citations omitted)."

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"Nevertheless, failure to submit special interrogatories was not an abuse of discretion. *See supra* p. 1317. The amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims. We find no reversible error****"

D. The Court of Appeals First Ignored and Later Explicitly Misapplied the Settled Standard for Determining the Harmless or Prejudicial Nature of the Error.

The opinion of the Court of Appeals, before it was amended on denial of rehearing, found the error at trial to be harmless without applying or articulating *any* standard. It said simply that the "case was not decided by a hairsbreadtn" and there "was ample evidence that consideration of age 'made a difference' in the termination Cancellier, Costello and Ritter." It also said that "the challenged instruction" was fashioned from Magnin's proposed instruction No. 21, but, as we have seen, the issue has always been the error of the District Court in failing to give the jury any hint as to the meaning or content of the "determining factor" test and it has never been suggested or held that the error was waived.

As early as 1936, this Court described as "well settled" the two-pronged rule (1) that errors in civil trials "which relate to the substantial rights of a party" are presumed prejudicial, and (2) substantive error requires reversal unless it affirmatively appears from the whole record that the error was harmless. *McCandless v. United States*, 298 U.S. 342, 347-48 (1936); *accord: United States v. River*

Rouge Improv. Co., 269 U.S. 411, 421 (1926); *Kotteakos v. United States*, 328 U.S. 750, 763-765 (1946); and especially *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). Magnin's petition for rehearing (App. C) called attention to the failure of the opinion of the Court of Appeals to even mention this settled law. On denial of rehearing (App. B) the Court amended the opinion to include citations to *Fillippon* and *McCandless* and a statement that "it affirmatively appears from the record that the instruction did not prejudice defendant." But in the amended opinion the *sole basis* for this conclusion continues to be that this "case was not decided by a hairsbreadth" and that there was "ample evidence that consideration of age 'made a difference.'"[17] Further, the Court seems to have undertaken to distinguish *Fillippon* and *McCandless*, while at the same time articulating the rule for which they stand, by creating a new category of harmless error. Thus the court said this case, where the harmlessness of the error rests on "ample" yet disputed evidence, is to be treated differently than cases in which an erroneous instruction affirmatively misstated the law "or forbade the jury to consider what it properly should have considered." Here, the Court said by amendment, the erroneous instruction "was merely an unelaborated version of the correct standard," a statement which stands in sharp contrast with the Court's earlier observation that the ADEA liability instruction given below "*completely failed* to give any guidance as to the meaning of 'determining factor' in lawsuits under the ADEA."

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17. The amendment added two additional citations, *Van Domelen v. Westinghouse Electric Corp.*, 382 F.2d 385, 387 (9 Cir. 1967), and *Tss Sportswear Ltd. v. Swank Shop (Guam), Inc.*, 380 F.2d 512, 522, 523 (9 Cir. 1967). The decisions are described parenthetically as involving "ample evidence of forbearance" and

Prior decisions of this Court and the Courts of Appeals have placed harmless error in civil jury instructions in five categories. The "ample" yet disputed evidence category articulated by the Court of Appeals here is alien to all of them. First, there are the cases where the jury instructions as a whole set out the law correctly, i.e., the instructions are correct when properly interpreted, *e.g., Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981); *Troutman v. Southern R. Co.*, 441 F.2d 586, 590-591 (5 Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1065 (5 Cir. 1980); *In Re Air Crash Disaster, Etc.*, 635 F.2d 67, 77 (2 Cir. 1980). Second, errors in jury instructions are harmless if they are effectively cured before the case is sent to the jury, *e.g., Baker v. Elcona Homes Corp.*, 588 F.2d 551, 560 (6 Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *Rivers v. Angf. A/B Tirfing*, 450 F.2d 12, 15 (5 Cir. 1971); *Mercer v. Theriot*, 377 U.S. 152, 154-55 (1964), *reh. denied*, 377 U.S. 973 (1964). Third, error in instructions affirmatively appear harmless if the verdict against appellant was rendered pursuant to instructions that misstated or miscast the law in favor of the appellant,[18] *e.g., Fury Imports, Inc. v. Shakespeare Co.*, 625 F.2d 585, 589 n.2 (5 Cir. 1980), *cert. denied*,

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"overwhelming support in record for result below." *Van Domelen* affirmed a judgment fully sustained by a ground free from error and as to which harmless error was committed respecting an alternate ground. *Tss Sportswear* affirmed a judgment in a nonjury case on the ground that the trial judge committed only harmless error in refusing reexamination and limiting examination of witnesses, matters within the discretion of the trial court. We think it not unfair to say that the inaptness of these decisions, taken together with the misapplication of *Fillippon* and *McCandless* on the face of the amended opinion, will enhance the risks we discuss here for future jury trials of age cases as a result of the Court of Appeals' decision.

18. The Court of Appeals itself plainly recognized that the error in the instructions it found here did not favor Magnin.

450 U.S. 921 (1981); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 350 (1 Cir. 1980), *cert. dismissed*, 449 U.S. 1135 (1981); and *Hydrolevel Corp v. American Soc. of Mechanical Engineers, Inc.*, 635 F.2d 118, 125-127 (2 Cir. 1980), *aff'd.*, ... U.S. ...., 102 S.Ct. 1935 (May 17, 1982). Fourth, an erroneous instruction is harmless where the verdict of the jury demonstrated an independent ground unaffected by the error which precluded recovery or defense on the ground to which the error related, *e.g., Stoddard v. School Dist.*, 590 F.2d 829, 834 (10 Cir. 1979); *Moczygemba v. Danos & Curole Marine Contractors*, 561 F.2d 1149, 1152 (5 Cir. 1977); *Smith v. Illinois C.R. Co.*, 486 F.2d 943, 946 (5 Cir. 1973), *cert. denied*, 416 U.S. 985 (1974); *Harris v. Quinones*, 507 F.2d 533, 538-39 (10th Cir. 1974); and *Horne v. Georgia S. & F. R. Co.*, 421 F.2d 975, 979-980 (5 Cir. 1970). Fifth, error in an instruction is harmless if the prevailing party was entitled as a matter of law to a directed verdict against the complaining party, *e.g., Charleston Nat. Bank v. Hennessey*, 404 F.2d 539, 543-44 (5 Cir. 1968); *Prebble v. Brodrick*, 535 F.2d 605, 613 (10 Cir. 1976); *Maryland Casualty Co. v. Dondlinger & Sons Constr. Co.*, 420 F.2d 1368, 1371-72 (8 Cir. 1970); *Vecchio v. Anheuser-Busch, Inc.*, 328 F.2d 714, 719 (2 Cir. 1964), *cert. denied*, 379 U.S. 831 (1964); and *Lieberman v. Gulf Oil Corp.*, 331 F.2d 160, 162 (2 Cir. 1964). In cases where the court has reversed and remanded as against a contention by an appellee that the adjudicated error was nevertheless harmless because the evidence supporting the judgment appealed from was ample or overwhelming, that claim has been uniformly and consistently rejected, *e.g., Clayton v. Burston*, 493 F.2d 429, 432 (5 Cir. 1974); *McGinnis Piano & Organ Co. v. Yamaha International Corp.*, 480 F.2d 474, 480-81 (8 Cir. 1973); *see also Gardner v. Wilkinson*, 643 F.2d 1135, 1137 (5 Cir. 1981)

(reversed for new trial despite substantial evidence in support of verdict); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5 Cir. 1981) (reversed on basis of single erroneous instruction despite sufficient evidence to support verdict); the Second Circuit rejected an "ample evidence" contention under ADEA in *Bentley v. Stromberg-Carlson, supra.*

Until this case, the traditional test for harmless error has been applied uniformly in age litigation under ADEA. *Haring v. CPC International, Inc., supra,* (error cured); *Geller v. Markham,* 635 F.2d 1027 (2 Cir. 1980), *cert. denied* 451 U.S. 945 (1981) (error cured); *Smith v. University of North Carolina,* 632 F.2d 316, 337 (4 Cir. 1980) (error favorable to appellant); *Loeb v. Textron, Inc., supra* (reversed despite strong evidence supporting verdict); *Laugesen v. Anaconda Co., supra* (reversed against claim that ample evidence supported verdict); and *Bentley v. Stromberg-Carlson Corp., supra* (reversed against claim that appellee was entitled to directed verdict).

The temptation—resisted successfully by other courts in ADEA cases—to forego the rigors of a new trial through an appellate finding of fact on liability, *cf. Pullman-Standard v. Swint,* ..... U.S. ....., 50 U.S.L.W. 4425, 29 FEP Cases 1073 (April 27, 1982), is natural, well understood and the subject of serious scholarship. See Traynor, *The Riddle of Harmless Error* (Ohio Univ. Press 1970), pp. 20-22.[19] We submit that observance of the separate provinces of court and jury is so fundamental to the jury system as to be organic. It inevitably includes the right of every litigant

19. "The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time-consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal

to a new trial where the jury verdict against that party is founded on substantive error.[20]

E. Erroneous Recognition of Harmless Error Poses a Special Threat to Effective Management of McDonnell-Douglas Procedure in Federal Age Discrimination Cases.

Although this Court has yet to decide explicitly that the procedure approved in *McDonnell-Douglas Corp v. Green*, 411 U.S. 792 (1973) governs ADEA cases, the Circuits which have been confronted with the question are unani-

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of saving time and money. Unfortunately it does not measure up to accepted standards of fairness."

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"There is a superficial appeal to the argument that if a new trial without error would clearly have the same result, justice would be delayed and judicial resources wasted by requiring it. Such an argument, however, assumes that the evidence would be the same, that counsel's tactics and the trial judge's rulings, aside from the error, would be the same, and that the reactions of the trial judge or jury would be the same as those of the previous judge or jury. Even in a context of these assumptions, the question does not qualify as a test of harmless error. The crucial question is not what might happen tomorrow on an edited rerun, but what did happen yesterday on the actual run."

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"• • • the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result. Overwhelming evidence may provide support, even conclusive support, for holding the error harmless, but it is not invariably conclusive. If the error was so forceful as to leave its mark on the judgment, the trial itself was contaminated. An appellant whose right to a fair trial in a trial court has been vitiated should be accorded that right anew. Retrial is a small price to pay for insuring the right to a fair trial."

20. Again, one need look no further than the opinion of the Court of Appeals itself to establish that the error in this case was substantive and not merely, as Moore has said in another connection, affected with "niceties of form."

Professional readers of the decision of the Court of Appeals with responsibilities in future cases will discover from the briefs that the harmless error holding here was against the undisputed facts of record that (1) within minutes after retiring the jury requested further instruction on the trial judge's "interpretation of ADEA," following which the erroneously inadequate instruction was reread, (2) plaintiffs joined Magnin in requesting an adequate liability instruction at the outset and (3) plaintiffs' counsel placed of record on their application for attorneys' fees their own discussion of counsel's concern about error in the instructions.

mous in holding that it does. *Loeb v. Textron, Inc., supra* at 1014-16[21]; *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 (2 Cir. 1981); *Rodriguez v. Taylor*, 569 F.2d 1231, 1239 (3 Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Smith v. University of North Carolina, supra* at 332-333 (4 Cir. 1980); *Williams v. General Motors Corp.*, 656 F.2d 120, 127-128 (5 Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1439 (Feb. 22, 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959-60 (8 Cir. 1978); *Douglas v. Anderson*, 656 F.2d 528, 532 (9 Cir. 1981); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60-61, (10 Cir. 1979); *cf. Laugesen v. Anaconda Co., supra* at 312.

Difficulties with *McDonnell-Douglas* are well-known. Recently this Court, in *Burdine*, reversed a judgment of the Fifth Circuit and held that the defendant's burden in meeting plaintiff's *prima facie* case is merely to articulate, not prove, a legitimate nondiscriminatory reason for adverse employment action. *McDonnell-Douglas* problems are especially critical in jury cases. The Courts of Appeals are not in agreement over what the jury is to be told about the shifting burden of going forward with evidence and the burden of ultimate persuasion in such cases. *Loeb v. Textron, Inc., supra* at 1016-17; *Laugesen v. Anaconda Co., supra* at 312; and *Spagnuolo v. Whirlpool Corp., supra* at 1113 n.2. Even more to the point, when the shifting burden of going forward with evidence results in a framing of the ultimate issue on which *Burdine* requires the plaintiff to sustain the burden of persuasion, a jury is helpless to decide the issue unless the court has provided a clear and intelligible standard, and the jury's helplessness for lack of a standard may become especially critical to the result where, as here, plaintiffs' *prima facie* case, defendant's explana-

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21. The decision of the First Circuit in *Loeb v. Textron, supra*, on *McDonnell-Douglas* is cited with approval in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

tion and plaintiffs' claim of pretext all clamor for the jury's consideration. We go so far as to say that *McDonnell-Douglas* has no chance to function in a jury case unless the jury is armed with a clearly stated liability standard adequately explained.

In this case the Court of Appeals brushed aside as harmless error a defect in the jury instructions on liability which, according to the Court of Appeals' emphatic language in both its original and amended opinion, deprived the jury of any information about the standard the jury was to apply in deciding whether plaintiffs had proved their cases by sustaining the burden which was always theirs under *Burdine*. Is it not obvious that the procedure of *McDonnell-Douglas* clarified in *Burdine* reaches its summit when the jury undertakes to test the plaintiff's entire case by application of a standard for ADEA liability given it by the court? Is it not equally plain that the appellate decision in this case will be understood to mean that if the jury is deprived at that critical moment of any standard at all to apply, the failure of the trial judge to provide a meaningful standard may nonetheless be only harmless error?

We do not hesitate to say that there is much in the decision and opinion of the Court of Appeals which will work profound evil and confusion in future jury trials of age discrimination and other cases sought to be tried under *McDonnell-Douglas*. For if error in the charge of the trial court, either through misinstruction or "completely" indequate instruction, may permissibly be brushed aside on the authority of the Court of Appeals in this case, the Courts of Appeals themselves and perhaps this Court inevitably will be faced with a recurring yet unnecessary issue. And this is especially so if the decision of the Court of Appeals is read, as it must be, as making the harmless or prejudicial character of such error turn upon an appellate determination that the evidence supporting

the judgment was "ample" even though sharply disputed at the trial.

II. This Court Should Now Approve for Federal Age Discrimination Cases Under ADEA the "But For" Test Approved for Title VII Cases in McDonald v. Santa Fe Trail Transp. Co.

The decision of this Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), approves the requirement for Title VII cases that race be a "but for" cause of the employer action complained of—no more, no less. As we have seen, the Courts of Appeals seem to have approved semantic variations in jury instructions on liability for violation of ADEA which have proved to be troublesome. The First, Fourth and Seventh Circuits hold that to establish a violation of ADEA the plaintiff must prove that age was a "determining factor" in the "but for" sense.[22] The Second and Fifth Circuits have followed the Sixth in approving a requirement that the plaintiff prove that "age made a difference."[23] The Ninth Circuit appears in this case, and in its decision last year of *Kelly v. American Standard, Inc., supra,* to have approved either "determining factor" or "age made a difference," or "their equivalent." The insistence of the Ninth Circuit in this case that "the *Kelly* jury instruction" be given in the future may mean either that district courts are to give the instruction in *Kelly* quoted in the margin of its opinion here (672 F.2d at 1315n.2) or an unspecified "equivalent." Both the Ninth Circuit, and the Second in *Bentley v. Stromberg-Carlson, supra,* have suggested that there is no real difference between the "determining factor" and "age made a difference" tests, but we submit that both as a matter of

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22. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1 Cir. 1979); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4 Cir. 1981), *cert. denied* ..... U.S. ....., 102 S.Ct. 316 (Oct. 5, 1981); and *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7 Cir. 1980).

23. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6 Cir. 1975); *Haring v. CPC International, Inc.*, 664 F.2d 1234 (5 Cir. 1981); and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2 Cir. 1981).

liability substance and jury impact the contrary will be true in many cases.

It might well be that the present state of the law announced in the circuits would argue for a decision of this Court approving a uniform ADEA liability standard even if the striking decision of the Court of Appeals here to apply a new rule of harmless error were absent. But when one considers the further specifics of *this case* where (1) the Court of Appeals has affirmed a multimillion dollar judgment founded on a liability instruction the Court itself held to be error in "completely fail[ing] to give any guidance as to the meaning" of the liability standard, (2) the Court of Appeals brushed the error aside as harmless because plaintiffs' evidence was "ample" even though in dispute, and (3) the trial was complicated by the complexities of *McDonnell-Douglas* procedure compounded by submission of general verdicts which compelled the jury to decide ADEA and pendent state claims upon *different* liability standards in a single undifferentiated verdict,[24] one sees a decision which will surely spawn an array of problems for future age discrimination litigation so productive of needless misunderstanding and demands for appellate review as to call for the guiding hand of this Court in achieving clarity and uniformity.[25]

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24. We stress the statement of the Court of Appeals itself (672 F.2d at 1317) that when "state claims for breach of the implied covenant of good faith and fair dealing are joined to claims of age discrimination under the ADEA *** review of jury verdicts presents special difficulties to appellate courts **** If the state claims are flawed, the entire verdict may have to be reversed."

25. The vagary or variousness in the statements by the Courts of Appeals of the standard for ADEA age discrimination liability seems to have arisen in the course of unanimous rejection by the circuits, including the Ninth, that in an ADEA case the plaintiff must prove that age was a "sole factor." When counsel and the courts seek to divine what a liability standard is from decisions holding what it is not, a fertile field for confusion and misunderstanding exists. We submit that in ADEA cases, as in Title VII litigation, declaration of a uniform standard by this Court would be highly desirable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follow)